Filed 3/8/19 P. v. Boles CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE, Plaintiff and Respondent, v. JARED DANIEL BOLES, Defendant and Appellant.	C084971 (Super. Ct. Nos. CRF 11-0000732, CRF 16-0003458, CRF 17-0001501)

Defendant Jared Daniel Boles stands convicted of various drug-related and other offenses in three different cases. He challenges only his most recent sentencing order, which embraced all three cases; his challenge is based on a law that took effect after his sentencing. We heard oral argument at the parties' request, then subsequently vacated submission and ordered supplemental briefing. For reasons we explain, we remand for a new sentencing hearing encompassing all three cases.

BACKGROUND

The details of defendant's offenses and cases are not pertinent to his claims on appeal. We discuss only his relevant convictions and subsequent sentencings. Although the record includes three separate cases, there are only two cases relevant here, to which we refer as the 2011 and 2016 cases, respectively.

2011 case

In the earliest case (No. 11-732, the 2011 case), defendant pleaded guilty to four felony drug charges and one misdemeanor resisting charge, counts 1 through 5. (Health & Saf. Code, §§ 11378, 11379, subd. (a); Pen. Code, § 148, subd. (a).)[1] He also admitted two prior drug conviction allegations (§ 11370.2) for each felony drug charge and three prior prison term allegations (Pen. Code, § 667.5, subd. (b)).

The two prior drug convictions were alleged to have occurred on January 31, 2007, and March 5, 2004, respectively. We refer to these convictions hereafter as the 2007 and 2004 drug allegations.

At the initial sentencing, the trial court imposed a sentence of the upper term of four years on count 1, plus three years consecutive for each of the 2007 and 2004 drug allegations and one consecutive year for each of the three prior prison term allegations, for a total of 13 years in prison. The court stayed the sentences and their corresponding allegations on counts 2 and 4 (Pen. Code, § 654), dismissed count 3 (*id.*, § 1385), and imposed a concurrent one-year jail term on count 5. The court suspended execution of the imposed sentence and granted defendant a three-year term of formal probation with various conditions; defendant did not appeal.

---

[1] Further undesignated statutory references are to the Health and Safety Code.

2016 case

In early 2017 a jury found defendant guilty of various drug and gun charges (No. 16-3458, the 2016 case), including as relevant here counts 1 and 2, which were two felony drug charges (§§ 11378, subd. (a), 11379, subd. (a)), each including five prior drug conviction allegations admitted prior to trial (§ 11370.2). Two of the five prior drug conviction allegations appear to be the 2007 and 2004 drug allegations admitted by defendant in the 2011 case.[2] The remaining three enhancements consisted of the charges from the 2011 case itself.

Probation violation and combined sentencing

The trial court found defendant had violated his probation in the 2011 case based on the evidence adduced at trial in the 2016 case.[3]

While in jail awaiting sentencing in the 2016 case, defendant was charged in case No. 17-150 (the 2017 case), alleging he possessed drugs while in jail pending sentencing on the jury verdicts in the 2016 case and the violation of probation in the 2011 case. Defendant pleaded no contest to possessing drugs in jail in exchange for a one-year consecutive sentence. There is no issue presented on appeal as to this plea and sentence.

On May 1, 2017, the trial court sentenced defendant on all three cases, including

---

[2] Although the parties agree without elaboration that these two allegations are for the same convictions in both the 2011 and 2016 cases, we note that although one prior conviction allegation bears the same date (January 31, 2007) on both charging documents, the other overlapping prior is identified in the 2011 case as occurring on March 5, 2004, and in the 2016 case as occurring on February 3, 2004.

[3] There appears to be no dispute that defendant was still on probation in the 2011 case at the time he was alleged to have committed the 2016 offenses. The record provided to us shows that on April 8, 2013, defendant's probation was extended to August 22, 2016, to allow him to complete a residential drug program. His offenses in the 2016 case were alleged to have occurred June 20 of that year.

execution of sentence previously imposed and suspended in the 2011 case, as we next describe.

The trial court initially selected the 2016 case as the principal term and announced its intent to run "the original 13-year case" concurrent thereto. As relevant here, for the 2016 case the court imposed the midterm of three years on count 1 and added consecutive three-year terms for all five prior drug conviction enhancements, including the 2007 and 2004 drug allegations. It then imposed consecutive sentences of eight months each on four additional counts, and stayed sentence on several other counts pursuant to Penal Code section 654. With the addition of three separate consecutive one-year terms for prior prison term enhancements, defendant received a total state prison sentence of 23 years and eight months on the 2016 case.

The trial court then addressed the 2011 case, ordering the four-year upper term on count 1 executed and the remaining two felony counts executed but again stayed (Pen. Code, § 654), consistent with the original order. The court also executed the concurrent one-year sentence on count 5. The court next purported to *vacate* the portion of the 2011 order imposing sentence on the enhancements (including the 2007 and 2004 drug allegations at issue here); after vacating the portion of the 2011 order imposing sentence on the enhancements, the court ordered "for all counts and case enhancements is that *both the imposition and execution of sentence on those is stayed* in order to avoid double-sentencing" with the 2016 case. (Italics added.)

This change to the previously imposed sentence in the 2011 case resulted in a total sentence of four years, rather than the originally imposed 13-year sentence, ordered to run concurrent with the 2016 case. Defendant timely appealed from the order after the 2017 sentencing hearing.

DISCUSSION

Defendant principally contends that new legislation effective January 1, 2018 applies to his 2017 sentence and requires striking all five of the drug conviction enhancements imposed in the 2016 case.

The Attorney General agrees as to the three *later* enhancements, based on the counts of conviction in the 2011 case itself and imposed for the first time at sentencing on the 2016 case, but disagrees as to the 2007 and 2004 drug allegations. He argues that because the 2007 and 2004 drug allegations were originally imposed at the *first* sentencing in the 2011 case, from which defendant did not appeal, those two allegations are final and the new legislation does not apply to them. He argues those two allegations should be reapplied to defendant's sentence on remand.

As we will explain, the trial court did not have the authority to alter defendant's previously imposed (and long final) 2011 sentence by vacating sentence on the enhancements and subsequently staying imposition of sentence therefor. Because the 2007 and 2004 drug allegations should have remained part of defendant's previously imposed sentence in the 2011 case, we remand for full resentencing on all three cases.

I

Senate Bill No. 180

Senate Bill No. 180 (2017-2018 Reg. Sess.), the legislation at issue here, eliminated a three-year enhancement for a prior drug conviction except in certain circumstances not applicable to defendant's cases on appeal. (Stats. 2017, ch. 677, § 1, eff. Jan. 1, 2018; see § 11370.2.) Other courts have applied the legislation retrospectively to *non*final judgments because the change reduces punishment. (See *People v. Millan* (2018) 20 Cal.App.5th 450, 455-456; *People v. Zabala* (2018) 19 Cal.App.5th 335, 338, 344.) This is in accord with *In re Estrada* (1965) 63 Cal.2d 740.

Thus, we agree with the parties that the three drug conviction enhancements for the 2011 charges, imposed for the first time at the 2017 sentencing hearing, should be

stricken: The proper disposition of any drug conviction enhancements not applied to the sentence is to strike rather than stay them. (See *People v. Edwards* (2011) 195 Cal.App.4th 1051, 1058 [classifying enhancements under § 11370.2 as "status enhancements"]; *People v. Williams* (2004) 34 Cal.4th 397, 402 [status enhancements do not attach to individual counts and may only be imposed once per sentencing]; *People v. Tillotson* (2007) 157 Cal.App.4th 517, 542 [ordering remaining status enhancements stricken where imposed in error].)

II

Sentence in the 2011 Case

The parties dispute the effect of the new legislation on the 2007 and 2004 drug allegations, originally imposed when defendant was granted probation on the 2011 case, as well as the effect of the trial court's changes to the previously imposed 2011 sentence at the time of the 2017 sentencing hearing. We requested supplemental briefing on whether the trial court's handling of the 2011 sentence at the 2017 sentencing hearing was correct. Although the parties loosely agree in their briefing that the trial court properly executed the previously imposed sentence in the 2011 case at the time of the 2017 sentencing, we disagree.[4] As we explain, the court was not authorized to vacate a portion of the 2011 sentencing order, which was a final judgment at the time of the 2017

---

[4] Although the Attorney General "acknowledges that the trial court's sentencing procedure might have been problematic as to [defendant's] status enhancements," he puzzlingly concludes that "in the pure context of handling [defendant's] probation revocation from his 2011 conviction, the trial court properly executed defendant's sentence." He then implicitly concedes the trial court lacked authority to partially vacate the sentence, writing after his argument that the enhancements should have been stricken rather than stayed, "[n]evertheless, assuming the trial court had the authority to vacate the 2011 drug priors . . . ." Similarly, defendant concludes that the trial court "properly executed the previously-imposed sentence" but then proceeds to argue the court "erred in its handling of duplicative status enhancements" and also fails to explain how reduction of a previously imposed (and final) sentence from 13 to four years was authorized.

sentencing hearing. The court was required to either reinstate probation or to lift the suspension of the previously imposed sentence, including all components thereof. This rule is well established, and the parties provide no authority to the contrary.

Our Supreme Court has explained that: "In our 1997 decision in [*People v. Howard* (1997) 16 Cal.4th 1081], we discussed the distinction between suspending imposition of a sentence and suspending execution of a sentence . . . . '[U]nlike the situation in which sentencing itself has been deferred, where a sentence has actually been imposed but its execution suspended, "[t]he revocation of the suspension of execution of the judgment brings the former judgment into full force and effect. . . ." ' [¶] We found these principles reflected in [Penal Code] section 1203.2, subdivision (c), and former rule 435(b)(2) of the California Rules of Court, which 'by their terms, limit the court's power in situations in which the court chose to impose sentence but suspended its execution pending a term of probation.' [Citation]. We concluded that '[o]n revocation of probation, if the court previously had imposed sentence, the sentencing judge must order *that exact sentence* into effect.' " (*People v. Scott* (2014) 58 Cal.4th 1415, 1423-1424.)

Thus, a trial court may revoke and terminate probation, but it must then order execution of the originally imposed sentence; it has no jurisdiction to do anything other than order the *exact sentence* executed. (See Pen. Code, § 1203.2, subd. (c); *People v. Howard*, *supra*, 16 Cal.4th at pp. 1087-1088; *People v. Martinez* (2015) 240 Cal.App.4th 1006, 1017.) As explained by the Fifth District in *Martinez*, the exact sentence includes enhancements. (*Martinez*, at pp. 1012-1013, citing cases.) The exact sentence includes any component of any sentence that was lawful at the time it was imposed. (See *id.* at pp. 1014-1015.) Here, there is no dispute that the sentence in the 2011 case was lawful at the time of its imposition--clearly it was. But the new version of this sentence, as executed at the 2017 sentencing, is not. The trial court was without jurisdiction to deviate from the original.

Because the trial court did not merely lift the suspension on the sentence previously imposed in the 2011 case, but instead purported to vacate certain portions thereof, the resulting sentence was unauthorized. We remand for resentencing so that the court may execute the sentence originally imposed in the 2011 case.

III

Finality

An order granting probation is appealable if a sentence is imposed, regardless of whether execution of that sentence is suspended. (See Pen. Code, § 1237, subd. (a); 6 Witkin, Cal. Crim. Law (4th ed. 2012) Criminal Appeal, § 58, pp. 334-335.) Defendant's 2011 sentence became final for purposes of retroactivity analysis when he failed to appeal within the allotted time. (See *People v. Superior Court (Rodas)* (2017) 10 Cal.App.5th 1316, 1325-1326 (*Rodas*); *People v. Wilcox* (2013) 217 Cal.App.4th 618, 623-627.)

Under *Estrada*, when an " 'amendatory statute mitigates punishment and there is no saving clause, the rule is that the amendment will operate retroactively so that the lighter punishment is imposed' if the amended statute takes effect before the judgment of conviction becomes final. [Citation.]" (*Rodas*, *supra*, 10 Cal.App.5th at p. 1321.)

Defendant points to authority holding: "There is nothing in *Estrada* that prohibits the application of revised sentencing provisions to persons whose sentences have become final if that is what the Legislature intended or what the Constitution requires." (*In re Chavez* (2004) 114 Cal.App.4th 989, 1000 (*Chavez*).) He argues the Legislature intended to reduce the number of inmates serving enhanced sentences for nonviolent drug offenses partly to address perceived endemic discrimination in the criminal justice system and to also eliminate disparity in sentencing between inmates in state prison and those in local

custody. He claims that for this reason all the relevant enhancements in both cases must be stricken.[5]

In *Chavez,* the petitioners sought the benefit of an amendment lessening punishment although their judgments became final before the new law took effect. Based on the legislative history and surrounding circumstances, *Chavez* held that the Legislature intended that the amendment--a correction of a legislative omission that kept the petitioners' punishment indeterminate, despite the passage of the Determinate Sentence Law--should apply retrospectively. (*Chavez*, *supra*, 114 Cal.App.4th at pp. 994-1000.)

Obviously *Chavez* was an exceptional case, but the general rule remains that " 'in the absence of an express retroactivity provision . . . [or] *unless it is very clear from extrinsic sources that the Legislature or the voters must have intended a retroactive application*,' ameliorative legislation does not affect convictions that have become final. [Citation.]" (*People v. Martinez* (2018) 4 Cal.5th 647, 655, italics added.) Generalized legislative intentions to ameliorate punishment are always present when an *Estrada* question is presented. Defendant does not point to anything specific in the legislative history that evinces an intention to alter final judgments to promote justice.

Accordingly, defendant is not entitled to the benefit of the new legislation regarding the 2007 and 2004 drug allegations.

---

[5] Defendant argues in his supplemental briefing that there is no authority for "resurrecting and reimposing the status enhancements after they ha[ve] been dismissed." He adds that the section 11370.2 status enhancements do not remain available for re-imposition (as the Attorney General argues in his supplemental briefing) because "they were effectively repealed as to [defendant's] conviction and can no longer be applied." We need not resolve this dispute because, as we have explained, the trial court's order vacating sentence on the 2007 and 2004 drug allegations was without jurisdiction and, as such, was unauthorized. Consequently, those two enhancements remain part of defendant's sentence in his 2011 case.

IV

Remand

Sentence in the 2011 case must be executed as previously imposed.

There is no issue briefed as to the consecutive one-year sentence imposed in the 2017 case, and that sentence was part of the bargained-for plea.

The trial court's discretion comes into play regarding the 2016 case. If the court had realized it lacked authority to vacate portions of the sentence in the 2011 case, it may well have made different sentencing choices in the 2016 case. Further, the non-final prior drug conviction enhancements are no longer available. Thus, the proper disposition is to remand for a new sentencing hearing.

We agree with the parties that the abstract of judgment erroneously reflects that defendant had a current or prior serious or violent felony and should be corrected to omit the erroneous reference. After resentencing, the trial court should prepare and forward to the Department of Corrections and Rehabilitation a certified copy of a new abstract of judgment that does not repeat the mistake.

DISPOSITION

The sentencing order is vacated and the cause is remanded for resentencing in a manner consistent with this opinion. The judgment is otherwise affirmed.

/s/
Duarte, J.

We concur:

/s/
Hull, Acting P. J.

/s/
Murray, J.